IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

MOREHOUSE ENTERPRISES, LLC d/b/a BRIDGE CITY ORDNANCE, et al., Plaintiffs, v. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, et al., Defendants.	Case No. 3:22-cv-00116-PDW-ARS

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

Plaintiffs submit this memorandum in support of their Motion for Injunction Pending Appeal.

"In determining whether to issue a stay pending appeal, [courts] consider four factors: (1) whether the party seeking the stay has demonstrated a strong likelihood of success on the merits; (2) whether the party seeking the stay will be irreparably injured without a stay; (3) whether a stay would substantially injure other parties; and (4) the public's interest." *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020). All those factors support a stay here.

First, Plaintiffs reiterate that they are likely to succeed on the merits of their claims and Plaintiffs hereby incorporate their prior arguments here. *See* Motion for Preliminary Injunction, ECF 14; Motion for Permanent Injunction, ECF 19; Notice of *Joinder*, ECF 36; and PI Reply, ECF 78. But beyond this, Plaintiffs assert that this case raises sufficiently significant questions to support an injunction pending appeal even where the Court initially disagrees as to their likelihood of success on the merits. Indeed, "tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844–45 (D.C. Cir. 1977). Where substantial questions are raised, the Eight Circuit notes that a party need not show a "greater than fifty per cent likelihood" of success on the merits. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981); *Walker v. Lockhart*, 678 F.2d 68, 71 (8th Cir. 1982) ("'where the movant has raised a substantial question and the equities are otherwise strongly in

his favor, the showing of success on the merits can be less.'") (*quoting Dataphase*, 640 F.2d at 113). Ultimately, an injunction is appropriate where there are "substantial questions of fact and law for determination" to preserve the status quo "until those questions [can] be determined." *Chicago, B&Q Railroad v. Chicago Great Western Railroad*, 190 F.2d 361, 363-64 (8th Cir. 1951).

And district courts throughout the Eighth Circuit have issued equitable relief pending appeal even where the courts were not convinced that the appellants would prevail so long as the legal questions were "substantial" or "close." *See, e.g.*, *Sweeney v. Bond*, 519 F. Supp. 124, 132 (E.D. Mo. 1981), *aff'd*, 669 F.2d 542 (8th Cir. 1982); *Perrin v. Papa Johns Int'l, Inc.*, No. 4:09CV01335, 2014 WL 306250, at *2 (E.D. Mo. Jan. 28, 2014); *see also Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) ("It will ordinarily be enough that the [movant] has raised serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation") (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). The challenge to the Final Rule presented here concerns an omnibus federal rulemaking spanning multiple topics, changes to decades-long definitions, reversals of previously stated ATF policy, expands or creates new federal crimes, affects industry and individuals, and has an ATF-estimated cost of at least $14.3 million. *See*, 87 Fed. Reg. 24,652, 24,654 (Apr. 26, 2022). That significance weighs in favor of granting a stay pending appeal.

Second, Plaintiffs will be irreparably harmed without a stay pending appeal. The Court did not directly address the arguments regarding the irreparable harm to the States, and those are incorporated here. *See* Notice of *Joinder*, ECF 36; and PI Reply,

ECF 78. Additionally, while the Court stated that the harms the Plaintiffs face are "speculative," Order at 25, ECF 85, Defendants do not appear to think so, acknowledging in both the Final Rule and the NPRM that there will be "a significant impact" on certain manufacturers and that some companies would "dissolve their business." PI Reply at 17, ECF 78. And ATF's own enforcement activities in preparation for the Final Rule's effective date disabuse one of the notion that such harms are purely speculative. *Id.* at 18-19. In the wake of the Final Rule, entire product lines have been shut down by manufacturers.[1] These harms are significant and irreparable, especially when considered over the course of an appellate litigation schedule during which businesses will not be able to sell products they previously relied upon to meet their expenses. Even in a few months, some are likely to, in the ATF's words, "dissolve."

Finally, the public interest and balance of equities weigh in favor of granting an injunction pending appeal. While the Court considers "the ATF's interest in law enforcement and public safety," Order at 25, ECF 85, it does not address the States' interests in the same, expressed through their own permissive legal schemes, and the sovereign injury they incur through the federal government's encroachment in the Final Rule. And as established, individuals and businesses will suffer unrecoverable economic harm and have their Second Amendment activity curtailed for fear of

[1] For instance, James Madison Tactical, a popular manufacturer of polymer 80% lower receivers for the AR-15 no longer has those products on its website for sale. Store, James Madison Tactical, store.jamesmadisontactical.com/default.asp (showing only one product line available: triggers), Ex. 1. Google search results for that company establish that 80% lowers previously constituted a main business line for them as they are mentioned in multiple of the top results. "James Madison Tactical," Google Search Results, www.google.com (search "James Madison Tactical"), Ex. 2.

crossing the ATF's still-unclear standards in the Final Rule while ATF is still capable of enforcing the current firearms laws—many of which already ban the illegal activity they claim the Final Rule will help combat—while the Final Rule is enjoined.

For these reasons, Plaintiffs respectfully request that this Court enjoin the Final Rule pending Plaintiffs' appeal of this Court's denial of their Motion for Preliminary Injunction.

Respectfully submitted,

Date: August 25, 2022

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* *Application for Admission Forthcoming*

CERTIFICATE OF SERVICE

I, Anthony R. Napolitano, hereby certify that I have on this day, caused the foregoing document or pleading to be filed with this Court's CM/ECF system, which caused a notice of the filing and a true and correct copy of the same to be delivered to all counsel of record.

Dated: August 25, 2022.

/s/ Anthony R. Napolitano
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